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Eldon P. Billings v. Weldon H. Brown and Gerda H. Brown : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ELDON P. BILLINGS,

Plaintiff-Appellant

vs.

Case No. ~~1769~~
17348

WELDON H. BROWN and
GERDA H. BROWN,

Defendants-Respondents

BRIEF OF RESPONDENTS

APPEAL FROM FOURTH DISTRICT COURT
IN AND FOR DUCHESNE COUNTY
HONORABLE ALLEN B. SORENSEN, PRESIDING

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FILED

FEB 25 1981

Clk., Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ELDON P. BILLINGS,)	
)	
Plaintiff-Appellant,)	
)	
vs.)	Case No. 1769
)	
WELDON H. BROWN and)	
GERDA H. BROWN,)	
)	
Defendants-Respondents.)	
<hr/>		

BRIEF OF RESPONDENTS

NATURE OF CASE AND DISPOSITION
IN LOWER COURT

The matter before the court is an appeal from an Order Staying Execution granted in the Fourth Judicial District Court, Duchesne County, by Honorable Allen B. Sorensen.

NATURE OF RELIEF

Respondent seeks affirmation of the lower court's order staying execution, and for his costs herein.

STATEMENT OF FACTS

Appellant obtained judgment against respondent in Uintah County on December 9, 1970. Said judgment was docketed in Duchesne County on March 11, 1974. Appellant then claims that the next action was taken by issuance of an execution on or about January 11, 1979, more than a month after the statute of limitations on enforcement of judgments had expired. Neither defendants or defendants' counsel have been served with a copy of said execution. The proceeding now before the court was commenced by the issuance of an execution on April 3, 1980. The case then proceeded to its present posture as reflected in the record.

ARGUMENT

POINT I

APPELLANT WAS NOT PREJUDICED BY THE TRIAL COURT'S MOTION CALLING FOR ORAL ARGUMENT ON DEFENDANTS' MOTION.

On May 15, 1980, defendants (respondents herein) filed their Motion for Stay of Execution and Motion to Quash, together with the supporting Affidavit and Memorandum of Point and Authorities. Appellant, on June 16, 1980, submitted his Memorandum of Points and Authorities in opposition to the motions, which was, in turn, answered by respondents' Response to Memorandum of Points and Authorities, filed August 6, 1980. Counsel for the parties verbally agreed that the matter would be submitted without oral argument. However, the court, on its own motion, set the matter for oral argument on August 11, 1980. Following receipt of notice of hearing, appellant's counsel wrote to the court advising that oral argument was not desired. On August 11, 1980, the matter was called up for hearing. Appellant was not present nor represented. Respondents

were not present but were represented by counsel. The court advised that the purpose of the hearing was to give appellant the opportunity to present sworn testimony showing that the statute of limitations had been tolled. Respondents' counsel did not present any argument. Respondents' motion was granted, and an order staying execution was issued.

By his own statement, appellant's counsel indicated that he did not desire oral argument. No oral argument was given by respondents' counsel. Appellant's claim of prejudice arising out of the hearing on August 11, 1980, is based solely upon his assumption that oral argument was submitted on behalf of respondents. Since there was no such argument, and since appellant had previously indicated that he did not desire oral argument, he was not prejudiced, and his claim is without merit.

POINT II

THE COURT CORRECTLY ORDERED THE STAY OF EXECUTION
HEREIN.

The judgment upon which this action is based was entered December 9, 1970. Rule 69, Utah Rules of Civil Procedure (U.R.C.P.) provides (in relevant part):

"Process to enforce a judgment shall be by a writ of execution unless the court otherwise directs which may issue at any time within eight (8) years after entry of judgment...."

Appellant admits that no execution was issued within the statutory

period. He claims, however, that the mere fact that he was working to obtain an execution tolled the running of the time prescribed by the above-cited rule. In Livingston v. Paxton, 2 U.481, the Utah Supreme Court held that the former provision to the rule was intended as a statute of limitations, and that an execution could not be lawfully issued on the judgment after eight (8) years from the entry thereof. Respondents submit that such a holding applies equally to the present rule.

Appellant argues that Section 78-12-40, Utah Code Annotated (1953) as amended, allows an extra year in which to have a Writ of Execution issued when improper application for the writ was initiated within the statutory time, but the writ was not issued timely. Respondents submit that the statute cited is clearly not applicable to enforcement of judgments. It is concerned solely with the commencement of actions, which actions, as set forth in Rule 3, U.R.C.P., are commenced by the filing of a complaint or by service of a summons. Appellant cites the case of Thomas v. Braffet's Heirs, 6 U.2d 57, 305 P2d 507, as authority for his argument. Respondents, however, submit that the case serves only to extend the rights of one "affirmatively seeking relief" to a defendant who has a counterclaim against the plaintiff. In the instant case, plaintiff clearly initiated his cause of action by filing the complaint upon which the judgment was granted. The statute and case as cited by plaintiff do not apply to this matter.

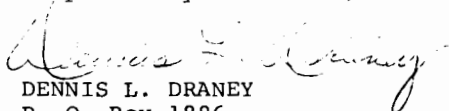
In the case of Yergensen v. Ford, 16 U 2d 397, 402 P2d 696, we find the position of the Supreme Court on this principle clearly defined. In that case, the court refused to extend the period of limitations for collection of judgment beyond the statutory eight (8) year period, even where promises to pay and partial payments had been made within the eight (8) year period.

Likewise, the court in Youngdale v. Burton, 102 U 169, 128 P2d 1053, interpreting a prior statute, held that execution on money judgments cannot issue after the statutory period of eight (8) years has elapsed.

In conclusion, respondents submit that the trial court properly granted the stay of execution in accordance with Utah statutes and the cases decided thereunder. Respondents pray that the order be affirmed, and that they be awarded their costs.

DATED this 23rd day of February, 1981.

Respectfully submitted,



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